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OCTOBER TERM, 1963.

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No. 41.

JOHN W. McCONNELL, JR., ET AL.,
Appellants-Intervenors,

versus

BETTYE FRINK, Secretary of State of the State of Alabama; B. A. REYNOLDS, Judge of Probate of Dallas County, Alabama; FRANK PEARCE, Judge of Probate of Marion County, Alabama; et al.,
Appellees-Defendants.

On Appeal from the United States District Court for the Middle District of Alabama, Northern Division.

BRIEF FOR APPELLEES, B. A. REYNOLDS AS JUDGE OF PROBATE OF DALLAS COUNTY, ALABAMA, AND FRANK PEARCE AS JUDGE OF PROBATE OF MARION COUNTY, ALABAMA.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

In addition to the Alabama constitutional and statutory provisions incorporated in Appellants' brief, the following other Alabama constitutional provisions and statutes are involved in this case:

Art. 9, Sec. 201. Should any decennial census of the United States not be taken, or if when taken, the same, as to this state, be not full and satis-

factory, the Legislature shall have power at its first session after the time shall have elapsed for the taking of said census, to provide for an enumeration of all the inhabitants of this State, upon which it shall be the duty of the Legislature to make the apportionment of Representatives and Senators as provided for in this article. Vol. 1, p. 203, Code of Alabama 1940.

Art. 9, Sec. 202. Until the legislature shall make an apportionment of representatives among the several counties, as provided in the preceding section, the counties of Autauga, Baldwin, Bibb, Blount, Cherokee, Chilton, Choctaw, Clay, Cleburne, Coffee, Colbert, Conecuh, Coosa, Covington, Crenshaw, Cullman, Dale, DeKalb, Escambia, Fayette, Franklin, Geneva, Greene, Lamar, Lawrence, Limestone, Macon, Marion, Marshall, Monroe, Pickens, Randolph, St. Clair, Shelby, Washington, and Winston, shall each have one representative; the counties of Barbour, Bullock, Butler, Calhoun, Chambers, Clarke, Elmore, Etowah, Hale, Henry, Jackson, Lauderdale, Lee, Lowndes, Madison, Marengo, Morgan, Perry, Pike, Russell, Sumter, Talladega, Tallapoosa, Tuscaloosa, Walker, and Wilcox, shall each have two representatives; the counties of Dallas and Mobile shall each have three representatives; the county of Montgomery shall have four representatives; and the county of Jefferson shall have seven representatives. Vol. 1, p. 203, Code of Alabama 1940.

Sec. 203. Until the legislature shall divide the state into senatorial districts, as herein provided, the senatorial districts shall be as follows:

First district, Lauderdale and Limestone; second district, Lawrence and Morgan; third district, Blount, Cullman, and Winston; fourth district, Madison; fifth district, Jackson and Marshall; sixth district, Etowah and St. Clair; seventh district, Calhoun; eighth district, Talladega; ninth district, Chambers and Randolph; tenth district, Tallapoosa and Elmore; eleventh district, Tuscaloosa; twelfth district, Fayette, Lamar and Walker; thirteenth district, Jefferson; fourteenth district, Pickens and Sumter; fifteenth district, Autauga, Chilton, and Shelby; sixteenth district, Lowndes; seventeenth district, Butler, Conecuh, and Covington; eighteenth district, Bibb and Perry; nineteenth district, Choctaw, Clarke, and Washington; twentieth district, Marengo; twenty-first district, Baldwin, Escambia, and Monroe; twenty-second district, Wilcox; twenty-third district, Dale and Geneva; twenty-fourth district, Barbour; twenty-fifth district, Coffee, Crenshaw, and Pike; twenty-sixth district, Bullock and Macon; twenty-seventh district, Lee and Russell; twenty-eighth district, Montgomery; twenty-ninth district, Cherokee and DeKalb; thirtieth district, Dallas; thirty-first district, Colbert, Franklin, and Marion; thirty-second district, Greene and Hale; thirty-third district, Mobile; thirty-fourth district, Cleburne, Clay, and Coosa; thirty-fifth district, Henry.

Art. 18, Sec. 284 . . . Representation in the Legislature shall be based upon population, and such basis of representation shall not be changed by constitutional amendment. Vol. 1, p. 287, Code of Alabama 1940.

Sections 42 and 43 of Art. 3 of the Constitution of 1901 and Section 44 of Art. 4 read as follows:

> Section 42. The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to-wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another. Vol. 1, p. 88, Code of Alabama 1940.
>
> Section 43. In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men. Vol. 1, p. 91, Code of Alabama 1940.
>
> Section 44. The legislative power of this state shall be vested in a legislature, which shall consist of a senate and a house of representatives. Vol. 1, p. 92, Code of Alabama 1940.

The following statutes were declared unconstitutional in this suit:

Act Number 93, Senate Bill 29, commonly referred to as the "67-Senator Amendment" proposing an amendment to the Constitution of Alabama relating to Legislative apportionment as passed in the 1962 Special Ses-

sion of the Legislature of Alabama, (Acts of Alabama, Special Session 1962, p. 124) which reads as follows:

> An Act, proposing an amendment to the Constitution of Alabama relating to legislative apportionment. BE IT ENACTED BY THE LEGISLATURE OF ALABAMA: Section 1. The following amendment to the Constitution of Alabama 1901 is proposed and shall become valid as a part thereof when approved and proclaimed as prescribed by law: Proposed Amendment 1. The legislature of Alabama shall consist of a senator for each county and 106 members of the house of representatives, to be apportioned among the several counties as herein prescribed; provided, that in addition to the above number of representatives each new county hereafter created shall be entitled to at least one representative. 2. At the general election in 1966, and every four years thereafter, a senator shall be elected by the qualified electors of each county in the state. 3. At the general election in 1966, and every four years thereafter, until the house of representatives is reapportioned as herein provided, the qualified electors of each county in the state shall elect such number of representatives as may be apportioned to the county as follows: The County of Jefferson shall have and elect seventeen representatives; the county of Mobile shall have and elect eight representatives; the County of Montgomery shall have and elect four representatives; the counties of Calhoun, Etowah, Madison and Tuscaloosa shall each have and elect three representatives; the counties of Dallas, Lauderdale, Morgan, Talladega and Walker shall each have and elect two representatives; and the remaining counties of the state shall each have and

elect one representative. 4. On the first day, or within one week thereafter, of the regular session of the legislature in 1971, and every fifth regular session thereafter, the clerk of the house of representatives shall transmit to the secretary of state a statement showing the whole number of persons in each county under the most recent decennial census of the United States, and the number of representatives to which each county will be entitled under an apportionment of the then existing number of representatives by the method known as the method of equal proportions, no county to receive less than one representative. 5. In Section 284 of this Constitution as amended, strike out the last sentence thereof and insert the following sentence: Representation in the house of representatives of the legislature shall be based upon population. 6. Article IX (sections 197-203) of this Constitution is hereby expressly repealed. Section 2. An election upon the proposed amendment is ordered to be held on the date of the general election next succeeding the final adjournment of the current session of the Legislature. The election shall be held in accordance with the provisions of Sections 284 and 285 of the Constitution of Alabama, as amended, and Chapter 1, Article 18, Title 17 of the Code of Alabama 1940. Section 3. Notice of the election and of the proposed amendment shall be given by proclamation of the Governor, which proclamation shall be published once a week for four successive weeks next preceding the day appointed for the election in a newspaper in each county of the State. In every county in which no newspaper is published, a copy of the notice shall be posted at each courthouse and post office.

Act Number 91, House Bill 59, commonly referred to as the "Crawford-Webb Bill" passed in the 1962 Special Session of the Legislature of Alabama (Acts of Alabama, Special Session 1962, p. 121) and approved by the Governor of the State of Alabama on July 12th, 1962 is as follows:

> An Act, to fix the number of senators and representatives in the legislature, divide the state into senatorial districts, and apportion the senators and representatives among the several districts and counties.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

> Section 1. The senate of the legislature shall be composed of 35 senators representing 35 senatorial districts, each district to elect one senator and no more.
>
> Section 2. The state is hereby divided into 35 senatorial districts as follows:
>
> First, the counties of Lauderdale and Limestone; second, the counties of Lawrence and Morgan; third, the counties of Cullman and Winston; fourth, the county of Madison; fifth, the counties of Jackson and Marshall; sixth, the county of Etowah; seventh, the county of Calhoun; eighth, the county of Talladega; ninth, the counties of Randolph and Chambers; tenth, the counties of Elmore and Tallapoosa; eleventh, the county of Tuscaloosa; twelfth, the counties of Fayette and Walker; thirteenth, the county of Jefferson; fourteenth, the counties of Pickens and Lamar; fifteenth, the counties of Autauga, Chilton and Shelby; sixteenth, the counties

of Monroe and Wilcox; seventeenth, the counties of Butler, Covington and Conecuh; eighteenth, the counties of Bibb and Perry; nineteenth, the counties of Clarke, Choctaw and Washington; twentieth, the counties of Marengo and Sumter; twenty-first, the counties of Baldwin and Escambia; twenty-second, the counties of Blount and St. Clair; twenty-third, the counties of Dale and Geneva; twenty-fourth, the counties of Barbour and Pike; twenty-fifth, the counties of Coffee and Crenshaw; twenty-sixth, the counties of Bullock and Macon; twenty-seventh, the counties of Lee and Russell; twenty-eighth, the county of Montgomery; twenty-ninth, the counties of Cherokee and DeKalb; thirtieth, the counties of Dallas and Lowndes; thirty-first, the counties of Colbert, Franklin and Marion; thirty-second, the counties of Greene and Hale; thirty-third, the county of Mobile; thirty-fourth, the counties of Coosa, Clay and Cleburne; thirty-fifth, the counties of Henry and Houston. In districts consisting of more than one county, the senators shall not be elected for more than one term consecutively from any one county in the district, but shall reside in and be elected alternately and in turn from each of the counties within such district. The first senator to be elected in such district shall reside in the county having the largest population, except where that county had the last preceding senator. It is provided, however, that any senator in office on the effective date of this enactment shall be eligible to succeed himself as a member of the Senate, any other provision of this paragraph to the contrary notwithstanding.

Section 3. The house of representatives of the legislature shall consist of 106 members distributed among the several counties of the state as follows:

The county of Jefferson shall have and elect 12, the county of Mobile 6, and the county of Montgomery 4, the counties of Calhoun, Etowah, Madison and Tuscaloosa 3 each, the counties of Baldwin, Colbert, Cullman, Dallas, Houston, Lauderdale, Lee, Marshall, Morgan, Russell, Talladega and Walker 2 each, and the remaining counties 1 each.

Section 4. This Act shall take effect for the election of Senators and Representatives at the general election to be held in November, 1966, and shall be effective thereafter until the legislature is reapportioned according to law.

Section 5. The provisions of this Act are severable. If any part of this Act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Also Sections 1 and 2 of Title 32 of the 1940 Code of Alabama which are as follows:

(1) House of Representatives. The house of representatives of the legislature consists of one hundred and six members, distributed among the several counties as follows: The counties of Autauga, Baldwin, Bibb, Blount, Cherokee, Chilton, Choctaw, Clay, Cleburne, Coffee, Colbert, Conecuh, Coosa, Covington, Crenshaw, Cullman, Dale, DeKalb, Escambia, Fayette, Franklin, Geneva, Greene, Houston, Lamar, Lawrence, Limestone, Macon, Marion, Marshall, Monroe, Pickens, Ran-

dolph, Shelby, St. Clair, Washington and Winston shall each elect one representative. The counties of Barbour, Bullock, Butler, Calhoun, Chambers, Clarke, Elmore, Etowah, Hale, Henry, Jackson, Lauderdale, Lee, Lowndes, Madison, Marengo, Morgan, Perry, Pike, Russell, Sumter, Talladega, Tallapoosa, Tuscaloosa, Walker and Wilcox shall each elect two representatives. The counties of Dallas and Mobile shall each elect three representatives. The county of Montgomery shall elect four representatives; and the county of Jefferson shall elect seven representatives.

(2) Senatorial Districts. The senate of the legislature shall consist of thirty-five members, and the state is divided into thirty-five senatorial districts, as follows: First, Lauderdale and Limestone; second, Lawrence and Morgan; third, Blount, Cullman and Winston; fourth, Madison; fifth, Jackson and Marshall; sixth, Etowah and St. Clair; seventh, Calhoun; eighth, Talladega; ninth, Chambers and Randolph; tenth, Tallapoosa and Elmore; eleventh, Tuscaloosa; twelfth, Fayette, Lamar and Walker; thirteenth, Jefferson; fourteenth, Pickens and Sumter; fifteenth, Autauga, Chilton and Shelby; sixteenth, Lowndes; seventeenth, Butler, Conecuh, and Covington; eighteenth, Bibb and Perry; nineteenth, Choctaw, Clarke and Washington; twentieth, Marengo; twenty-first, Baldwin, Escambia and Monroe; twenty-second, Wilcox; twenty-third, Dale and Geneva; twenty-fourth, Barbour; twenty-fifth, Coffee, Crenshaw, and Pike; twenty-sixth, Bullock and Macon; twenty-seventh, Lee and Russell; twenty-eighth, Montgomery; twenty-ninth, Cherokee and DeKalb; thirtieth, Dallas; thirty-first, Colbert, Franklin

and Marion; thirty-second, Greene and Hale; thirty-third, Mobile; thirty-fourth, Clay, Cleburne and Coosa; thirty-fifth, Henry and Houston.

THE QUESTIONS PRESENTED FOR REVIEW.

1. Ought the three-judge District Court to have exercised jurisdiction in this cause?

2. Does the Federal District Court have constitutional power to reapportion the Legislature of Alabama by affirmative action?

3. Does Article IV of the Constitution of the United States prohibit a Federal Court from asserting power and authority over a state legislature?

4. Was the apportionment of both Houses of the Legislature of the State of Alabama (which apportionment was pursuant to Article 9, §§ 202 and 203 of the Constitution of Alabama of 1901 and §§ 1 and 2, Title 32, Code of Alabama) "invidious discrimination" in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

5. Were the appellees in this cause denied the equal protection of the law accorded them by the Fourteenth Amendment to the Constitution of the United States by the failure of the Legislature to reapportion itself on a strictly population basis?

6. Is a "little federal system" in a state legislature constitutional, or must both the senate and house be apportioned strictly according to population?

7. Should the Court have declared invalid a proposed amendment to the Constitution of Alabama which by the act of the Legislature is to be submitted to the people of the state?

8. Is Act No. 93, Senate Bill 29, commonly referred to as the "67-Senator Amendment", proposing an amendment to the Constitution of Alabama relating to legislative apportionment as passed in the 1962 Special Session of the Legislature for the State of Alabama on July 12, 1962, an unconstitutional proposal within the meaning of the equal protection provisions of the Fourteenth Amendment to the Constitution of the United States?

9. Is the Act No. 91, House Bill 59, commonly referred to as the "Crawford-Webb Bill" passed in the 1962 Special Session of the Legislature and approved by the Governor of the State of Alabama, on July 12, 1962, an unconstitutional act within the meaning of the equal protection provisions of the Fourteenth Amendment to the Constitution of the United States?

10. How rapidly should the Courts move to remedy Legislature malapportionments?

STATEMENT OF THE CASE.

This suit was brought by M. O. Sims and others as voters and tax payers of the State of Alabama, on their behalf and others similarly situated against Bettye Frink, as Secretary of State of the State of Alabama, the sixty-seven Probate Judges of the State, including these Appellees, and other officials who were charged by law with performing and exercising certain duties and powers in connection with the nomination and election of the members of the Alabama Legislature. The suit alleged a denial of the equal protection of the law as preserved under the Fourteenth Amendment to the Constitution of the United States because of the failure of the Legislature of Alabama to reapportion legislative districts on the basis of population as provided by the State Constitution. R. 1.

From the decree rendered by the District Court decreeing certain statutes of the State of Alabama, relating to the reapportionment of the Legislature of Alabama to be unconstitutional and void, and reapportioning the Legislature of Alabama by judicial decree, and in ordering and enjoining these Appellees and the other defendants in said suit from taking any action that would hinder or obstruct the Court's decree in apportioning the Legislature, B. A. Reynolds, as Judge of Probate of Dallas County, Alabama, and Frank Pearce, as Judge of Probate of Marion County, Alabama, perfected a separate appeal to this Court, which is number 23 on the docket of the Court, and has been consolidated with this case for oral argument.

Briefs on behalf of Appellants (Appellees in this case) have been filed in this Court in case number 23 and a detailed statement of the case is contained in that brief.

While B. A. Reynolds as Judge of Probate of Dallas County, Alabama, and Frank Pearce as Judge of Probate of Marion County, Alabama, are technically Appellees in this case, they are Appellants in Case No. 23, and this cause should be reversed and remanded with directions to the District Court for the reasons set forth in the brief filed by Appellants in Case No. 23 and on the grounds hereinafter set forth in this brief.

SUMMARY OF ARGUMENT.

Legislative reapportionment should be resolved without federal interference. This Court should reconsider its decision in *Baker v. Carr*, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663, and return to the original constitutional proposition that courts do not interfere with the political structure of state governments.

Even under the decision of this Court in *Baker v. Carr*, the District Court should not have retained jurisdiction in this case, because the factual situation in the case at bar is different from the one considered in the Tennessee case. In Alabama the apportionment of the Legislature is based on a population rather than a voter basis and the number of seats in the House are limited to 106 and each one of the 67 counties of the state is entitled to at least one representative. The ap-

portionment of the State Senate is limited to 35 members and is divided into senatorial districts according to population and the Constitution provides that "no county shall be divided into two districts, and no district shall be made up of two or more counties not contiguous to each other".

Unlike the Tennessee case, while this suit was pending, the Alabama Legislature passed two acts—one of which was patterned after the Congress, was called the "67-Senator Act" and provided for a constitutional amendment by which each county of the state was to have one senator, and after providing for one member of the House for each county of the state as required under the Alabama Constitution, the remaining members of the House were to be apportioned on a population basis—the other act passed by the Legislature was called the "Crawford-Webb Act" and was to take effect in the event the proposed constitutional amendment was not passed by a vote of the people of the state.

Neither one of said acts were invidious *per se*, but were based on rational state policy. Both of said acts were valid and constitutional acts of the Legislature and should not have been declared unconstitutional by the District Court.

In no event should the District Court have reapportioned the Legislature by affirmative action.

ARGUMENT.

The suit in this case is patterned after the suit brought by the voters of the State of Tennessee and decided by this Court in *Baker v. Carr*, 82 S. Ct. 691. In the Tennessee case the plaintiffs, as in this case, claim that they were denied the equal protection of the law accorded them by the 14th Amendment of the Constitution of the United States by virtue of the debasement of their vote. A three judge district court dismissed the complaint and held it lacked jurisdiction of the subject matter. On appeal in *Baker v. Carr, supra*, this court reversed the case and merely held: "(a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) * * * that the appellants have standing to challenge the Tennessee Apportionment Statutes". Mr. Justice Frankfurter and Mr. Justice Harlan dissented and wrote separate opinions. The District Court of Tennessee did not reach the merits of that claim and the Supreme Court expressed no view on the merits. Prior to *Baker v. Carr, supra*, the Supreme Court had consistently ruled that apportionment of congress or state legislatures was a political question and refused to assume jurisdiction in such cases. Illustrative of this are the cases of *Colegrove v. Green*, 328 U.S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432; *MacDougall v. Green*, 335 U.S. 281, 69 S. Ct. 1, 93 L. Ed. 3; *South v. Peters*, 339 U.S. 276, 70 S. Ct. 641, 94 L. Ed. 834.

That the legislative powers of the people can be organized according to the dictates of a federal judiciary is in violation of the doctrine that the government shall be composed of the executive, legislative and judicial branches, each of whom should exercise separate, but equal, powers. A federal judiciary that can dictate the organization of a state legislature can indirectly dictate the organization of the United States Congress because seats in its House of Representatives are districted and redistricted by act of state legislature. Legislative reapportionment should be resolved without federal interference.

The case at bar is illustrative of the confusion which can result from interference by the federal judiciary following the decision in *Baker v. Carr, supra.*

The soundness of the majority opinion in *Baker v. Carr,* has been questioned by members of the bar, courts and students of government and for that reason we urge the court to reconsider its decision in that case and return to the original constitutional proposition that courts do not interfere with the political structure of state government.

Even under the decision in *Baker v. Carr,* the district court should not have retained jurisdiction in this case because the factual situation in the case at bar is different from the one considered in the Tennessee case in the following respects:

Under the Tennessee Constitution, (Secs. 5 & 6) the apportionment of the house and senate was to make

among the several counties or districts according to the number of qualified voters in each. In Alabama the apportionment of the legislature is based on a population rather than a voter basis, and the number of seats in the house are limited to 106 and each one of the 67 counties of the state is entitled to at least one representative. Sections 197, 198 and 199 Alabama Constitution 1901. The apportionment of the state senate is limited to 35 senators and is divided into senatorial districts according to population and the constitution provides that "no county shall be divided into two districts, and no district shall be made up of two or more counties not contiguous to each other." Sec. 200 of the Constitution of Alabama 1901.

Unlike the Tennessee Legislature which had not acted on reapportionment since the year, 1901, the Alabama Legislature while this suit was pending in an extraordinary session called by the Governor passed two acts, one of which was Act Number 93, Senate Bill 29, commonly referred to as the "67-Senator Amendment". This act proposed an amendment to the Constitution of Alabama relating to legislative apportionment which was to be submitted to a vote of the people and was declared by the lower Court to be an unconstitutional proposal within the meaning of the Equal Protection Provisions of the Fourteenth Amendment to the Constitution of the United States. The other act being Act Number 91, House Bill 59, commonly referred to as the "Crawford-Webb Bill", was likewise declared by the District Court to be an

unconstitutional act within the meaning of the Equal Protection Clause of the Constitution.

Both of said acts were declared to be, "void, invalid, and ineffective" to the extent that they attempt to correct the denial of plaintiffs' rights, said denial arising from the debasement of plaintiffs' votes in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. While the Court declared both of the aforesaid acts unconstitutional, in our opinion both of said acts were constitutional and valid reapportionment acts of the Legislature as we will subsequently point out in this brief.

After declaring said acts unconstitutional, the lower Court then assumed the duties of the Legislature, mapped the political structure of the state, and apportioned the Legislature by Judicial Decree according to its own views, all of which was hurriedly done in a period of some thirteen days.

The District Court's Decree reapportioning the Legislature was entered subsequent to the Democratic Primary in May and prior to the General Election to be held in November, 1962.

In *Baker v. Carr*, the District Court was not called on to "re-map" the state, or to hurriedly provide relief in the face of an impending election, and in that case appellants suggested a step-by-step approach, which did not involve an assumption by the District Court of legislative duties or responsibilities. (Taken from page 20 of appellant's brief in *Baker v. Carr.)*

Should the Court have declared invalid a proposed amendment to the Constitution of Alabama which by the act of the legislature was to be submitted to a vote of the people of the state?

The proposed 67-Senator Act which was to be submitted to a vote of the people of the state was framed after the Federal System of government—namely one senator in each county of the state. The District Court in its decree accepted as completely satisfactory the provisions of this act as it relates to House reapportionment by the method of equal proportion. We will therefore discuss the merit of the 67-Senator Amendment as it relates to senatorial redistricting.

It is at once essential to recognize the basic issue involved here. It relates solely to the right of a state to structure its Legislature in accordance with provisions which it considers in the best interest of the state at large.

In declaring the proposed 67-Senator Amendment invalid, the District Court concluded as a matter of law that the people of this state cannot by Constitutional amendment or by Constitutional convention alter the basic structure of its Legislature. If unit representation in the Senate is invidious *per se*, then it would be futile to resort to convention to so provide.

In at least nine states today county or town units are given equal representation in the Legislative branch regardless of the number of each unit's inhabitants.

Among fourteen states it is required that there be one Senator for each district or else limit a district to one Senator.

There are twenty states in which each county or town unit is entitled to one representative in the Lower House. See Appendix "1" *infra* at page 31.

If the 67-Senate provision is not invidious *per se*, can it be said that it is invidious as being based on no rational policy? In this connection we would point out that there is nothing in the Federal Constitution to prevent a state acting not irrationally from choosing any electoral Legislative structure it thinks best suited to the interest, temper, and customs of its people. *MacDougall v. Green*, 335 U. S. 281, in which the Court observed that to "assume that political power is a function exclusively of numbers is to disregard the practicalities of government, and reaffirmed by *South v. Peters*, 339 U. S. 276.

It may be said that it results in gross inequality but even gross inequality may be justified if based upon a permissible state policy and is not arbitrarily and capriciously applied.

If it can be determined that the 67-Senate Amendment rests upon a permissible policy the function of the Federal judiciary ends upon such determination. We refer to Appendix 3 indicating the manner in which seven counties characterized by industrialization and fifty per cent or better of their population is repre-

sented by single or contiguous cities. It is submitted that such concentration of Legislative power into the hands of the industrial community of this state to the extent of forty-one representatives represents a potential power of control in the House of Representatives such as to prevent submission of Constitutional amendments to the people. The power thus represented when exercised as a "stranglehold" can be sufficiently disruptive and obstructive as to prevent, if not in fact control, the distribution of revenues and the removal of agricultural tax exemptions to the detriment of all the people of Alabama.

Unless the people of Alabama are permitted to structure their Legislature in a manner to provide protection from the domination of a handful of cities, then the Court has as a matter of law asserted final authority and control over matters which properly should remain for Legislative and not judicial determination.

The Supreme Court of Alabama in Opinion of Justices 61 So. 2d 881, (1955), by a divided Court, held that notwithstanding the provisions of 284 of the Constitution the people could "legally and lawfully remove any provision from the Constitution which they previously put in or ratified, even to the extent of amending or repealing one of the sections comprising our Declaration of Rights, even though it is provided that they 'shall forever remain inviolate.'"

It is respectively submitted that the 67-Senator Act was a valid and constitutional act of the Legislature and should be submitted to a vote of the people.

Should the District Court have declared unconstitutional the Crawford-Webb Act of the Legislature?

With *Baker v. Carr* in mind, let us now examine the method of apportionment of the Alabama Legislature employed in this act.

It will be observed by reference to Appendix "2" *infra* at page 33, that the House apportionment provided by the Crawford-Webb Act is the method of smallest divisors with this minor exception two seats, which would ordinarily be apportioned to Jefferson County and one seat which would ordinarily be apportioned to Mobile County, have instead been apportioned one each to Russell, Cullman and Colbert Counties.

While the method of apportionment employed in the Crawford-Webb Act is not stated in the act, nor need it have been so stated, it is nevertheless obvious. The classifications used were reasonable, logical, rational and were designed to carry out unquestioned state policy of allocating State Legislative power in a manner to prevent unwholesome concentration of power. The population classifications upon which the Crawford-Webb Act is based, are as follows:

After providing one representative to each county, as provided for in the Constitution, the balance of thirty-nine House seats were apportioned according to population by classification:

Counties 45,000— 90,000	1 additional seat
Counties 90,000—150,000	2 additional seats
Counties 150,000—300,000	3 additional seats
Counties 300,000—600,000	5 additional seats
Counties 600,000 and over	11 additional seats

An apportionment based on the method of smallest divisors is an apportionment by known and accepted standards and even though biased in favor of small counties, such bias is consistent with and in furtherance of unquestioned state policy. This policy is clearly indicated by the separate provision of the Alabama Constitution designed to protect the small counties by the original apportionment of one to each county and by the additional provision of the Constitution limiting one county to a single Senatorial district.

Disparities in population as may appear are inherent in any and all mathematical methods of apportionment. The question is the degree of disparity and whether or not such disparity can be justified on the basis of state policy, and thus avoid the onus of invidiousness.

The minor deviations in the Crawford-Webb Act from an apportionment under the method of smallest divisors is justified and equitable and based upon legislative judgment concerning the best method of guaranteeing protection against concentration of political power in the Alabama Legislature.

Many states are apportioned under provisions which put definite limitations upon the number of Representatives, of Senators, as the case may be, from any one political unit. We refer the Court to the dissenting opinion of Justice Frankfurter in *Baker v. Carr*, in which a tabulation is made from the *Book of the States 1962-63* of apportionment methods previously employed throughout the United States.

What is involved in this suit is an abstract question of political power concerning the structure and organization of the Alabama Legislature. It would be utterly impossible to argue the wisdom of the state policy with respect to allocation of power without making of the Court a forum for political debate.

Test for Invidiousness.

While the United States Supreme Court may not have established guide lines in some respects, it seems to us that it did speak clearly in *Baker v. Carr* on the following points:

1. That gross population variations are not invidious *per se*.

2. That such discriminations are not invidious if they can be shown to conform to a rational state policy designed to protect the rural interests of the state from domination by other segments of the economy.

3. That to constitute "invidiousness" any discrimination based on population must equate "no policy" or else be totally irrational as to defy any conceivable state of facts upon which to justify the discrimination.

It is respectively submitted that when the above test is applied the Crawford-Webb Act was a valid and constitutional act of the Legislature and should not have been declared unconstitutional by the District Court.

The District Court was not justified in apportioning the legislature of Alabama by judicial decree. As

stated by Mr. Justice Frankfurter in his dissenting opinion in *Baker v. Carr*, 82 S. Ct. 691 (1962):

> "In all of the apportionment cases which have come before the Court, a consideration which has been weighty in determining their non-justiciability has been the difficulty or impossibility of devising effective judicial remedies in this class of case. An injunction restraining a general election unless the legislature reapportions would paralyze the critical centers of a State's political system and threaten political dislocation whose consequences are not foreseeable. A declaration devoid of implied compulsion of injunctive or other relief would be an idle threat. Surely a Federal District Court could not itself remap the State: the same complexities which impede effective judicial review of apportionment a fortiori make impossible a court's consideration of these imponderables as an original matter. And the choice of elections at large as opposed to elections by district, however unequal the districts, is a matter of sweeping political judgment having enormous political implications, the nature and reach of which are certainly beyond the informed understanding of, and capacity for appraisal by, courts. - - -
>
> "Although the District Court had jurisdiction in the very restricted sense of power to determine whether it could adjudicate the claim, the case is of that class of political controversy which, by the nature of its subject, is unfit for federal judicial action."

CONCLUSION.

Many questions are presented in this case which were not considered by the Court in *Baker v. Carr*. More is involved here than the rights of parties litigant. The very foundation of state government is at stake. If this decision is allowed to stand, then the State of Alabama and its sister states are not sovereign states.

It is therefore respectfully submitted that this Court should reconsider the decision in *Baker v. Carr* and should return to the original constitutional proposition that courts do not interfere with the political structure of states government; that this Court should determine and decree that the District Court did not have power or authority to reapportion the Legislature of Alabama, or if it did have such power the Court was not justified in apportioning the Legislature of Alabama by judicial decree; that the "67-Senator Act" and the "Crawford-Webb Act" were valid and constitutional acts of the Alabama Legislature; and that a justiciable controversy did not exist between the appellants and the appellees in this case, and the case should have been dismissed by the District Court.

It is respectfully submitted that this case should be reversed and remanded to the District Court with directions that the judgment be vacated and the case be dismissed; and, that an election be held in accordance with the existing laws of the State of Alabama for members of the Legislature in accordance with the Statutes of that state as they existed prior to the

judgment of the District Court in this case, upon call by the Governor of Alabama.

Respectfully submitted,

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I, Joseph E. Wilkinson, Jr., one of the attorneys for the Appellees, B. A. Reynolds, as Judge of Probate of Dallas County, Alabama, and Frank Pearce, as Judge of Probate of Marion County, Alabama, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of September, 1963, I served copies of the foregoing brief on the several Appellees and Cross-Appellants, by mailing copies in duly addressed envelopes, with first class postage, prepaid, to their respective attorneys of record as follows:

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APPENDIX No. 1.

TABLE OF STATES

APPORTIONED UNDER PROVISIONS REQUIRING ONE SENATOR PER DISTRICT OR LIMITING A SENATORIAL DISTRICT TO ONE SENATOR

AUTHORITY: **BOOK OF THE STATES 1962-63**

Alabama	Nevada
California	New Jersey
Connecticut	New Mexico
Florida	South Carolina
Georgia	Texas
Idaho	Vermont
Iowa	Wyoming
Montana	

TABLE OF STATES

REQUIRING HOUSE REPRESENTATION OF NOT LESS THAN ONE PER COUNTY

AUTHORITY: **BOOK OF THE STATES 1962-63**

Alabama	New Mexico
Arkansas	New York
Hawaii	North Carolina
Idaho	North Dakota
Iowa	Ohio
Kansas	Pennsylvania
Mississippi	South Carolina
Missouri	Utah
Montana	West Virginia
New Jersey	Wyoming

APPENDIX No. 2.

COMPARISON: HOUSE APPORTIONMENT UNDER PROVISIONS OF ACT No. 91; METHOD OF EQUAL PROPORTIONS; AND METHOD OF SMALLEST DIVISORS

County	Crawford-Webb Act, Act 91	SDM	EPM
Jefferson	12	14	17
Mobile	6	7	8
Montgomery	4	4	4
Calhoun	3	3	3
Etowah	3	3	3
Madison	3	3	3
Tuscaloosa	3	3	3
Baldwin	2	2	1
Colbert	2	1	1
Cullman	2	1	1
Dallas	2	2	2
Houston	2	2	1
Lauderdale	2	2	2
Lee	2	2	1
Marshall	2	2	1
Morgan	2	2	2
Russell	2	1	1
Talladega	2	2	2
Walker	2	2	2

Balance of counties one each under all apportionment methods.

APPENDIX No. 3.

TABLE OF TEN INDUSTRIAL COUNTIES SHOWING CITY POPULATION AS PER CENT OF TOTAL COUNTY POPULATION

County	City	Population	Co. Pop.	% Rounded of Total Pop.
Jefferson	Birmingham	340,887	634,864	54%
Mobile	Mobile	202,779	314,301	64%
Montgomery	Montgomery	134,393	169,210	79%
Madison	Huntsville	72,365	117,348	61%
Tuscaloosa	Tuscaloosa	63,370	109,047	58%
Etowah	Gadsden	58,088	96,980	59%
Calhoun			95,878	39%
	(Oxford	3,603		
contiguous	(			
	(Anniston	33,657		
		37,260		

(Boundaries extended since census to increase population of Oxford)

Lauderdale			61,622	
Colbert			46,506	
			108,128	
	(Florence	31,649		
contiguous	(Sheffield	13,499		
	(Tuscumbia	8,994		
		54,142		50%
Morgan	Decatur	29,217	60,454	